

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

VICTOR TAGLE,

Plaintiff,

v.

STATE OF NEVADA, *et al.*,

Defendants.

Case No. 2:15-cv-02083-RCJ-GWF

SCREENING ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis* and a motion for records/court case documents for the records of nine cases he has pending in federal court. (ECF No. 1-1, 3, 7, 5). The Court now screens Plaintiff’s civil rights complaint pursuant to 28 U.S.C. § 1915A.

I. IN FORMA PAUPERIS APPLICATION

Before the Court is Plaintiff’s application to proceed *in forma pauperis*. (ECF No. 3, 7). Based on the information regarding Plaintiff’s financial status, the Court finds that Plaintiff is not able to pay an initial installment payment towards the full filing fee pursuant to 28 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments towards the full \$350.00 filing fee when he has funds available.

II. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See

1 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss
2 any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted
3 or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C.
4 § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v.*
5 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. §
6 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the
7 Constitution or laws of the United States, and (2) that the alleged violation was committed by
8 a person acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

9 In addition to the screening requirements under § 1915A, pursuant to the Prison
10 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the allegation
11 of poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which
12 relief may be granted, or seeks monetary relief against a defendant who is immune from such
13 relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which
14 relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court
15 applies the same standard under § 1915 when reviewing the adequacy of a complaint or an
16 amended complaint. When a court dismisses a complaint under § 1915(e), the plaintiff should
17 be given leave to amend the complaint with directions as to curing its deficiencies, unless it is
18 clear from the face of the complaint that the deficiencies could not be cured by amendment.
19 See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

20 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel*
21 *v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
22 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the
23 claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.
24 1999). In making this determination, the court takes as true all allegations of material fact
25 stated in the complaint, and the court construes them in the light most favorable to the plaintiff.
26 See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se*
27 complainant are held to less stringent standards than formal pleadings drafted by lawyers. See
28 *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While the standard under Rule 12(b)(6) does not

1 require detailed factual allegations, a plaintiff must provide more than mere labels and
 2 conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation
 3 of the elements of a cause of action is insufficient. *Id.*

4 Additionally, a reviewing court should “begin by identifying pleadings [allegations] that,
 5 because they are no more than mere conclusions, are not entitled to the assumption of truth.”
 6 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide the
 7 framework of a complaint, they must be supported with factual allegations.” *Id.* “When there
 8 are well-pleaded factual allegations, a court should assume their veracity and then determine
 9 whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a
 10 complaint states a plausible claim for relief . . . [is] a context-specific task that requires the
 11 reviewing court to draw on its judicial experience and common sense.” *Id.*

12 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua*
 13 *sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This includes
 14 claims based on legal conclusions that are untenable (e.g., claims against defendants who are
 15 immune from suit or claims of infringement of a legal interest which clearly does not exist), as
 16 well as claims based on fanciful factual allegations (e.g., fantastic or delusional scenarios).
 17 See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); see also *McKeever v. Block*, 932 F.2d
 18 795, 798 (9th Cir. 1991).

19 **III. SCREENING OF COMPLAINT**

20 Plaintiff sues several defendants for events that occurred while he was incarcerated at
 21 High Desert State Prison (“HDSP”). (ECF No. 1-1 at 1). Plaintiff sues the State of Nevada,
 22 the Nevada Department of Corrections,¹ James Cox, Neven, and Maria Vital. (*Id.* at 2-3). He
 23 alleges one count and seeks monetary damages. (*Id.* at 4-9, 12).

25 ¹ The Court dismisses with prejudice all claims against the State of Nevada as
 26 amendment would be futile. See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989)
 27 (holding that states are not persons for purposes of § 1983). The Court also dismisses with
 28 prejudice all claims against the NDOC, as amendment would be futile. The NDOC is an arm
 of the state of Nevada and is not a “person” for purposes of 42 U.S.C. § 1983. See *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Black v. Nevada Dep’t of Corr.*, 2:09-cv-2343-PMP-LRL, 2010 WL 2545760, *2 (D. Nev. June 21, 2010).

1 Plaintiff alleges the following in his complaint: On February 28, 2012, he was sent to
2 Valley Hospital where he had his gall bladder removed. (*Id.* at 4). Since then, Plaintiff has had
3 a “dull pain” at the wound site, lots of gas, and swelling. (*Id.*). He has had to take digestive
4 medication on a daily basis since the surgery. (*Id.*). Plaintiff was seen by Dr. Romero, Dr.
5 Sanchez, Dr. Koehn, and Dr. Dulce during 2012 to 2013 time period about the pain he was
6 suffering from. (*Id.*). They gave him digestive medication and said they would refer him to
7 Valley Hospital which never occurred. (*Id.* at 4-5.) In late 2014, Maria Vital began treating
8 Plaintiff. (*Id.*). Plaintiff alleges she claims to be a doctor, “but she’s a nurse.” (*Id.* at 5-6). Vital
9 examined Plaintiff on January 19, 2015, told him there was nothing wrong with him and to “stop
10 complaining.” (*Id.* at 6.) Vital examined him a second time and cut off his medication. (*Id.*).
11 After Plaintiff complained, his medication was reinstated. (*Id.*). Plaintiff continued to complain
12 that Vital was not a doctor so a “Dr. John Doe”² examined Plaintiff but found nothing wrong with
13 him. (*Id.* at 6-7). On July 7, 2015, Plaintiff was transferred to Ely State Prison and seen by Dr.
14 Koehn who prescribed ibuprofen. (*Id.* at 7). Plaintiff then returned to HDSP and continued to
15 suffer from pain. (*Id.* at 7-8). Plaintiff alleges that Vital told him that the “John Doe doctor” who
16 saw him was “Romero Aranas” but Plaintiff has been seen by Dr. Aranas in the past and
17 Plaintiff knows Dr. Aranas has since left HDSP. (*Id.* at 8-9).

18 Plaintiff alleges defendants have been deliberately indifferent to his serious medical
19 needs in violation of the Eighth Amendment. (*Id.* at 9).

20 The Eighth Amendment prohibits the imposition of cruel and unusual punishment and
21 “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and
22 decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the Eighth
23 Amendment when he acts with “deliberate indifference” to the serious medical needs of an
24 inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To establish an Eighth Amendment
25 violation, a plaintiff must satisfy both an objective standard—that the deprivation was serious
26 enough to constitute cruel and unusual punishment—and a subjective standard—deliberate

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28 ² The doctor gave Plaintiff his name but did not have an ID on. (*Id.* at 6).

1 indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012).

2 To establish the first prong, “the plaintiff must show a serious medical need by
3 demonstrating that failure to treat a prisoner’s condition could result in further significant injury
4 or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th
5 Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference prong, a plaintiff
6 must show “(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical
7 need and (b) harm caused by the indifference.” *Id.* “Indifference may appear when prison
8 officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the
9 way in which prison physicians provide medical care.” *Id.* (internal quotations omitted). When
10 a prisoner alleges that delay of medical treatment evinces deliberate indifference, the prisoner
11 must show that the delay led to further injury. *See Shapley v. Nevada Bd. of State Prison*
12 *Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985) (holding that “mere delay of surgery, without more,
13 is insufficient to state a claim of deliberate medical indifference”).

14 However, “a complaint that a physician has been negligent in diagnosing or treating a
15 medical condition does not state a valid claim of medical mistreatment under the Eighth
16 Amendment. Medical malpractice does not become a constitutional violation merely because
17 the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Even gross negligence
18 is insufficient to establish deliberate indifference to serious medical needs. *See Toguchi v.*
19 *Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

20 Plaintiff has been seen by nurse Vital on a number of occasions and takes issue with
21 the fact that she is not a physician and the treatment, or lack thereof, that she has given him.
22 “A difference of opinion between a prisoner-patient and prison medical authorities regarding
23 treatment does not give rise to a § 1983 claim.” *Franklin v. State of Or., State Welfare Div.*,
24 662 F.2d 1337, 1344 (9th Cir. 1981). To establish that a difference of opinion amounted to
25 deliberate indifference, the prisoner “must show that the course of treatment the doctors chose
26 was medically unacceptable under the circumstances” and “that they chose this course in
27 conscious disregard of an excessive risk to [the prisoner’s] health.” *Jackson v. McIntosh*, 90
28 F.3d 330, 332 (9th Cir. 1996).

1 Plaintiff fails to state a claim against Vital. Plaintiff's main allegation is that nurse Vital
2 is not a doctor and he is not happy with the treatment he is receiving. Plaintiff's allegations do
3 not rise to the level of deliberate indifference. Plaintiff has been seen by several doctors and
4 complains about all of the treatment he has received. Mere disagreement with a course of
5 treatment, as Plaintiff's complaint alleges, is insufficient to state an Eighth Amendment claim.
6 There is no indication that Vital has acted with conscious disregard of an excessive risk to
7 Plaintiff's health. Instead, it is simply that Plaintiff disagrees with the care he is receiving and
8 the fact that she is a nurse. Even if Plaintiff's allegations rose to the level negligence, they
9 would still be insufficient to state a colorable Eighth Amendment claim as negligence is not a
10 cognizable constitutional claim.

11 Further, as to defendants Cox and Neven, a defendant is liable under 42 U.S.C. § 1983
12 "only upon a showing of personal participation by the defendant." *Taylor v. List*, 880 F.2d
13 1040, 1045 (9th Cir. 1989). "A supervisor is only liable for constitutional violations of his
14 subordinates if the supervisor participated in or directed the violations, or knew of the violations
15 and failed to act to prevent them. There is no respondeat superior liability under [§]1983." *Id.*;
16 *see also Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (holding that "[b]ecause vicarious liability
17 is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official
18 defendant, through the official's own individual actions, has violated the Constitution").

19 "A showing that a supervisor acted, or failed to act, in a manner that was deliberately
20 indifferent to an inmate's Eighth Amendment rights is sufficient to demonstrate the
21 involvement—and the liability—of that supervisor." *Starr v. Baca*, 652 F.3d 1202, 1206-07 (9th
22 Cir. 2011). "Thus, when a supervisor is found liable based on deliberate indifference, the
23 supervisor is being held liable for his or her own culpable action or inaction, not held vicariously
24 liable for the culpable action or inaction of his or her subordinates." *Id.* at 1207. As such, "a
25 plaintiff may state a claim against a supervisor for deliberate indifference based upon the
26 supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her
27 subordinates." *Id.*

28 In addition to not stating an Eighth Amendment claim as discussed above, Plaintiff has

1 not made any allegations specifically towards defendants Cox and Neven to show their
2 personal participation as supervisory defendants in any alleged constitutional violations.

3 Plaintiff's complaint will be dismissed with prejudice as he has failed to state a claim
4 upon which relief can be granted. Plaintiff will not be given leave to amend as amendment
5 would be futile.

6 **IV. CONCLUSION**

7 **IT IS THEREFORE ORDERED** that Plaintiff's application to proceed *in forma pauperis*
8 (ECF No. 3, 7) without having to prepay the full filing fee is **GRANTED**. The Clerk of Court
9 **SHALL FILE** the complaint. (ECF No. 1-1). Plaintiff shall **not** be required to pay an initial
10 installment fee. Nevertheless, the full filing fee shall still be due, pursuant to 28 U.S.C. § 1915,
11 as amended by the Prisoner Litigation Reform Act. The movant herein is permitted to maintain
12 this action to conclusion without the necessity of prepayment of fees or costs or the giving of
13 security therefor. This order granting *in forma pauperis* status shall not extend to the issuance
14 and/or service of subpoenas at government expense.

15 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the
16 Prisoner Litigation Reform Act, the Nevada Department of Corrections shall pay to the Clerk
17 of the United States District Court, District of Nevada, 20% of the preceding month's deposits
18 to the account of Victor Tagle, #1080239 (in months that the account exceeds \$10.00) until
19 the full \$350 filing fee has been paid for this action. The Clerk shall send a copy of this order
20 to the attention of **Albert G. Peralta, Chief of Inmate Services for the Nevada Department**
21 **of Prisons**, P.O. Box 7011, Carson City, NV 89702.

22 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
23 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by
24 the Prisoner Litigation Reform Act.

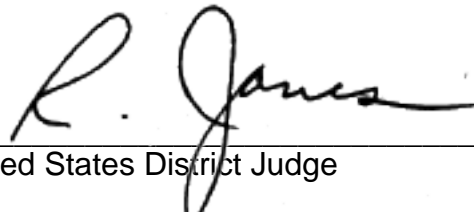
25 **IT IS FURTHER ORDERED** that Plaintiff's complaint (ECF No. 1-1) is **DISMISSED in**
26 **its entirety, with prejudice**, for failure to state a claim.

27 **IT IS FURTHER ORDERED** that Plaintiff's motion for records/court case documents
28 (ECF No. 5) is **denied**.

1 **IT IS FURTHER ORDERED** that this Court certifies that any *in forma pauperis* appeal
2 from this order would **not** be taken “in good faith” pursuant to 28 U.S.C. § 1915(a)(3).

3 **IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment accordingly.

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6 DATED: This 21st day of April, 2016.

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9 _____
United States District Judge